EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act, R.S.B.C. 1996, c. 113

-by-

W.G. McMahon Canada Ltd.

("McMahon" or the "employer")

- of a Determination issued by -

The Director of Employment Standards

(the "Director")

ADJUDICATOR:	Kenneth Wm. Thornicroft
FILE No.:	1999/182
DATE OF HEARING:	August 6th, 1999
DATE OF DECISION:	September 16th, 1999

DECISION

APPEARANCES

Paul Fairweather	Legal Counsel for W.G. McMahon Canada Ltd.
David A. Joyce	Legal Counsel for Dianne Mendonca
No appearance	for the Director of Employment Standards

OVERVIEW

This is an appeal brought by W.G. McMahon Canada Ltd. ("McMahon" or the "employer") pursuant to section 112 of the *Employment Standards Act* (the *"Act"*) from a Determination issued by a delegate of the Director of Employment Standards (the "Director") on March 3rd, 1999 under file number ER038-837 (the "Determination").

The Director's delegate determined that McMahon terminated the employment of Dianne Mendonca ("Mendonca") because of her pregnancy, contrary to section 54(2)(a) of the *Act*. Pursuant to section 79(4)(c) of the *Act*, Mendonca was awarded $16,801.38 as compensation for her wrongful termination. Further, by way of the Determination, the Director also levied a $0 penalty pursuant to section 98 of the *Act* and section 29 of the *Employment Standards Regulation*.

I should note at the outset that counsel for both McMahon and Mendonca agree that the delegate erred in calculating what Mendonca's employment insurance maternity benefits would have been had she not been terminated and thus, even if one accepts the delegate's approach to calculating Mendonca's loss, she was nevertheless "overcompensated".

The employer's appeal was heard at the Tribunal's offices in Vancouver on August 6th, 1999 at which time I heard the testimony of former McMahon employees, Brooks Gowanlock ("Gowanlock") and Carly McNeil ("McNeil"), on behalf of the employer and the testimony of Mendonca on her own behalf.

THE DETERMINATION

As noted above, the delegate determined that McMahon terminated Mendonca's employment because she was pregnant. The delegate rejected the employer's assertion that Mendonca had been hired by the local manager without authority and that the position for which Mendonca had been hired was intended to be filled by another employee who was being transferred from the employer's head office in Winnipeg, Manitoba.

Having found that the employer breached section 54(2)(a) of the *Act,* the delegate awarded Mendonca compensation based on her "lost earnings" from the date of her termination, April 17th, 1998 until the end of August 1998 as well as vacation pay and an amount reflecting "lost maternity benefits" payable pursuant to the federal employment insurance program. Counsel both agree that the delegate erred in calculating this latter award. The delegate awarded compensation "on the basis of 'making whole' or to place the complainant in the same or comparable position that she would have been in had the contravention not occurred" (Determination, page 6).

ISSUES TO BE DECIDED

The principal issues to be addressed in this appeal are whether or not Mendonca was terminated because of her pregnancy and, if so, to what extent should the award made in her favour be varied. As previously noted, both counsel agree that, at the very least, the delegate erred in calculating Mendonca's "lost" maternity benefits.

FACTS AND ANALYSIS

McMahon is a wholesale floor covering distributor. It has a office/warehouse facility in Delta and its head office is located in Winnipeg. At the material time, the Delta operation employed some 7 warehouse personnel, about the same number of sales representatives, and a 3-person clerical staff.

There is no dispute that Mendonca was hired by Gowanlock, the employer's former operations manager, sometime in late March 1998 and that she commenced her employment on April 6th, 1998. Mendonca's employment was terminated on April 17th, 1998. Mendonca was pregnant--and the employer was aware that she was pregnant--when her employment was terminated on April 17th. Of course, the employer's position is that Mendonca's pregnancy was not the reason for her termination.

Gowanlock testified that in March 1998 a long-time staff member quit and he understood that he was authorized by the branch manager, Fred Olson ("Olson", now the vice-president of sales), to hire a replacement employee for the clerical position. Gowanlock contacted Mendonca--whom he had interviewed for another position that had been advertised in the latter part of 1997--interviewed her, and then offered her the position at the end of the interview. Mendonca accepted the job offer but asked to delay her start date for a couple of weeks. Mendonca was hired to handle reception and telephone switchboard duties; she also was to undertake some clerical duties such as filing. Mendonca was hired at a monthly salary of $1700 and was subject to a 3-month probationary period after which time her salary was to be increased by $50 per month.

Mendonca commenced her employment on Monday, April 6th, 1998. On or about Wednesday April 15th (*i.e.*, during Mendonca's second week of employment), Olson told Gowanlock that "there was a problem" with Mendonca's employment and that head office had indicated that Gowanlock was not authorized to hire a replacement employee as there was a pending plan to transfer a male employee, Miles Jones, from Winnipeg to the Delta office--this employee would be given both clerical and sales

duties. Gowanlock says he challenged the head office directive but to no avail; he was told to terminate Mendonca which he did on Friday, April 17th.

The day before Gowanlock terminated Mendonca, he spoke with the other two clerical staff members and advised them of the situation; at that time Gowanlock says he first learned that Mendonca was pregnant. On Friday he called Mendonca into his office, explained the situation, indicated that he "had no choice in the matter" that it "was out of my hands" and terminated her. Mendonca appeared to be disappointed but not unduly upset by the news--certainly, she did not cry or sob as she now asserts; Mendonca did mention that she was pregnant. Miles Jones arrived in early August 1998; Jones divided his time about equally between his sales and clerical duties. Jones left McMahon in January of 1999 and his clerical duties were then assigned to a newly hired part-time employee. Gowanlock left McMahon one month after Jones.

Section 126(4)(b) of the *Act* provides as follows:

> 126. (4) The burden is on the employer to prove...
>
> > (b) that an employee's pregnancy...is not the reason for terminating the employment...

For a variety of reasons, set out below, I am not satisfied that the employer has discharged its burden of proving that Mendonca was not terminated because of her pregnancy. Gowanlock was clear in his evidence that new employees could only be hired if the proposed hire could be "justified" to head office. This policy certainly makes sense in light of the fact that in the few previous years the employer had terminated a number of employees in a general "downsizing" of its operations. Gowanlock took his request to hire a replacement employee to Olson who, in turn, by company protocol would secure authority to hire from the Winnipeg head office. Gowanlock testified that Olson "gave me the OK to hire Mendonca" and that her payroll forms etc. were completed on Mendonca's first day of employment and would have been delivered by overnight courier to the Winnipeg payroll office by Wednesday of her first week. Mendonca was answering the telephone in the Delta office as and from April 6th with a standard greeting which included the use of her first name. She would have received, during that first week, a number of telephone calls from Winnipeg head office personnel and yet no one questioned Gowanlock during that first week about his "new hire".

I have no evidence before me from anyone in a position of authority or responsibility to explain why, after authorization to hire Mendonca had apparently been given, a decision was made to terminate Mendonca's employment on Wednesday of her second week. I find it curious that Jones, if he was to be the replacement employee, never arrived in Delta until August 1998. An individual was brought in on an intermittent part-time basis to help with the workload and thus one has to wonder why, at the very least, Mendonca was not offered a part-time position. I might add that Gowanlock's evidence was that, in his view, the position that was eventually filled by Miles Jones could have been filled by Mendonca although she would have required some training.

I do not have the benefit of Jones' testimony as to when he was advised that he would be transferred to Delta. No one from the employer's head office, nor Olson from the local office, testified before me

regarding the decision to replace the departed clerical employee with a transferee from head office and absolutely no internal personnel documents have been tendered to corroborate the employer's assertion in this regard.

At least one person in authority, namely, Gowanlock, was aware of Mendonca's pregnancy prior to her termination. McNeil, a fellow clerical employee, testified that she was aware of Mendonca's pregnancy by her second week of employment and, given the small and intimate nature of the Delta office, I think it reasonable to assume that other employees, and quite possibly Olson, were also aware of Mendonca's pregnancy several days before her termination. McNeil specifically recalled telling Gowanlock that Mendonca was pregnant and also that she "advised Mendonca to tell [Gowanlock]" about her pregnancy--something Mendonca says she did on the day before her termination; Gowanlock, for his part, does not recall being so advised.

Even if I was satisfied that the employer had discharged its section 126(4)(b) burden, and accepted the employer's position that Mendonca was hired for a nonexistent position, the evidence nevertheless shows that McMahon misrepresented "the availability of a position" and thereby breached section 8 of the *Act*. In such circumstances, it should be noted that section 79(4)--the section pursuant to which Mendonca was awarded compensation--applies regardless of whether Mendonca's termination amounted to a contravention of section 8 or a contravention of section 54(2)(a) of the *Act*.

Having found that Mendonca is entitled to a remedy under section 79(4), I now turn to the appropriateness of the remedy ordered in this case.

The Appropriate Remedy

Section 79(4) sets out several alternatives to remedy a breach of section 8 or Part 6 of the *Act*, including, in subsection (b), reinstatement together with payment of lost wages. Thus, by way of the extraordinary remedy of reinstatement with full back pay, an individual is "made whole" (at least in a financial sense)--in other words, the individual is placed in essentially the same economic position that they would have been in had the contravention not occurred. This, of course, is the precisely the approach the delegate took, not by way of a reinstatement order, but rather through a compensation order. I am of the view that the "make whole" approach is entirely appropriate in this case and when fashioning section 79(4) remedies in general

What, then, ought to be awarded in order to make the Mendonca whole? Despite the contrary finding in the Determination (and in her counsel's written submission to the Tribunal), it now is apparent that Mendonca was not employed when she was offered a position with McMahon; indeed, she had recently been fired by her former employer because of that employer's dissatisfaction with her job performance.

Mendonca was initially subject to a 3-month probation with McMahon and there is some (perhaps only small) probability that she would not have successfully completed her probationary period. During her probation, the employer would have been within its rights under the *Act*, subject to section 8 or Part 6, to terminate her employment without any notice or termination pay whatsoever [see section 63(1)].

Even if she successfully completed her probation, her hours of work may have been reduced either during or after her probation or she might have been terminated with only 1 week's notice or an equivalent amount of termination pay. Although Mendonca had been more or less steadily employed during the several years before she was hired by McMahon, her employment history includes a number of short-duration positions lasting 6 months or less. She is now a student and did not return to the workforce after her daughter was born. After her termination Mendonca did not find alternative employment, nor did she make much of effort to secure alternative employment in the period between mid-April 1998 and the birth of her daughter (who was born some 6 months after Mendonca was terminated). Mendonca was not given to understand that she had a "permanent position" and Mendonca was aware that McMahon had previously terminated a number of employees as part of its "downsizing" initiative.

In *Afaga Beauty Service Ltd.* (B.C.E.S.T. Decision No. 318/97), a case where the employer wrongfully terminated an employee who was on pregnancy leave, the Tribunal observed:

> "This section of the Act [section 79(4)] is unique in that it anticipates that a former employee may be reinstated after an unjust dismissal or...can receive compensation instead of reinstatement. In the latter case, appropriate compensation for loss of employment normally is based on the circumstances of the employee, e.g., length of service with the employer, the time needed to find alternative employment, mitigation, other earnings during the period of unemployment, projected earnings from previous employment and the like."

In my view, the factors identified above are properly to be taken into account in making a compensatory award under section 79(4)(c) of the *Act* bearing in mind that the purpose of the award is to, as far as is reasonably possible, return the employee--at least in an economic sense--to the position the employee would have been in had the contravention not occurred.

I have before me a former employee who was not "lured away" from secure employment, whose employment history is not marked by periods of long-term employment and who chose to leave the workforce to return to school after the birth of her daughter. She made little, if any, effort to secure alternative employment following her termination. Although I have found that the employer did not discharge its burden under section 126(4)(b) of the *Act,* Mendonca may well have been discharged for some other reason in any event in which case her entitlement would not have exceeded 1 week's notice or 1 week's wages in lieu of notice.

Given the above-discussed factors and contingencies, I am of the view that an appropriate compensatory award under section 79(4)(c) of the *Act* is the equivalent of 3 months' wages (at $1700 per month) plus 4% vacation pay. I am also of the view that Mendonca's "lost" employment insurance maternity benefits are recoverable, but only based on the difference between what Mendonca actually received and what she would have been entitled to receive had her employment with McMahon ended after 3 1/2 months' service rather than after only 2 weeks' service. In addition, Mendonca is entitled to interest, to be calculated in accordance with section 88 of the *Act*, on the full amount of her award as and from April 17th, 1998. I do not accept Mendonca's counsel's argument that section 79(4)(d) empowers me to order McMahon to reimburse Mendonca for her legal fees and disbursements.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be confirmed as to the finding that Mendonca's employment with McMahon was terminated contrary to section 54(2)(a) of the *Act*. The $0 monetary penalty is also confirmed. The Determination is varied with respect to Mendonca's entitlement to compensation.

I will leave it to counsel to determine between themselves Mendonca's precise monetary entitlement. In the event that counsel are unable to reach such an agreement, I will retain jurisdiction to determine Mendonca's entitlement.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal